FILE NO. 27,740

IN THE

Supreme Court of the United States

October Term, 1920

No. 383

THE BANK OF JASPER,
A CORPORATION,

Petitioner,

vs.

THE STATE BANK OF ROME,
A CORPORATION.

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR CERTIORARI

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STATEMENT OF THE CASE

Since petitioner's brief contains no statement of the case, except as might be incompletely gleaned from the petition for writ of certiorari, we present such statement, which includes certain important facts not mentioned in the petition.

This is a purely private controversy in which no final judgment has been rendered. Under the decision of the Circuit Court of Appeals, this case awaits trial in the District Court. Furthermore, when this case is sent back to the District Court for trial, there are a number of pleas and replica-

tions which were withdrawn under stipulation, but which petitioner may then refile (R. 87).

This is a common law action in which the respondent bank, a foreign corporation citizen of Georgia, seeks to recover from the petitioner bank, a citizen of Florida, upon the several certificates of deposit described in and attached to the several counts of respondent's declaration (R. 5).

There is but one plea to each count at present standing in the record (R. 87). This plea sets up a purported decree of the State Circuit Court of Hamilton County, Florida, in Chancery, which decree attempts to cut off respondent's rights in and to the certificates of deposit sued on in the respective counts (R. 9). Respondent demurred to this plea contending that it was bad because the decree therein set forth was based on mere constructive service of process and yet the decree sought to operate *in personam*, (R. 23). The District Court over-ruled this demurrer (R. 26). In so doing the District Court rendered an opinion in the case of *First National Bank of Jasper, Florida vs. The First National Bank of Rome, Georgia*, (No. 372), which is found at page 42 et seq. of the transcript of record in that case.

Respondent filed one replication to petitioner's plea to each count (R. 28). This replication sets forth in detail every step of said chancery suit in the Florida State Courts in so far as respondent in any way participated therein, and shows the total invalidity of said decree attempting to cut off respondent's rights. Petitioner demurred to this replication which demurrer was sustained (R. 84). The District Court in sustaining this demurrer announced that "the questions attempted to be raised

by these replications are questions passed upon by this Court in its ruling upon the demurrer to the pleas. I adhere to the ruling then made." (R. 86)

There was and could have been no showing in said chancery suit that respondent foreign corporation bank was doing business in Florida, or had any representative in Florida upon whom service was or could have been made. The only semblance of service of process was by publication.

Looking at the proceeding in said chancery suit as set forth in said plea and replication, it is seen that both the original and amended Bills of Complaint therein, by their very allegations, preclude any contention that said equity suit was *in rem*, for in both of said Bills it was distinctly alleged that said certificate of deposit was void, and the Bills prayed for a decree declaring the certificate of deposit to be void (R. 36, 50); that every pleading or other paper of any kind filed by the respondent in said chancery suit was limited and recites that the respondent was "not appearing generally but appearing specially, solely and only and limiting this appearance to what in contemplation of law amounts only and solely to a special appearance;" that respondent filed two motions to quash the attempted service upon it, the second motion being filed after an amendment to the bill of complaint; each of these motions were denied; that thereupon "special appeals" were sued out in two chancery cases, and stipulations filed in fourteen other chancery cases that the decision of the Florida Supreme Court in the two cases should be decisive of the validity of the service in the fourteen cases, *but that the stipulations shall not be considered as constituting a general appearance;* (that there were sixteen chan-

cery cases in all will appear by an examination of the four transcripts now before this Court in the instant and its three companion cases); a second stipulation was entered into in the chancery cases which further emphasizes that these special appeals did not constitute a general appearance, this second stipulation being appended to the notice of application for supersedeas and reading "We agree that this notice shall in no sense operate as a general appearance in the above case;" and is signed by the then counsel for complainant (R. 65); that after the ruling of the Supreme Court of Florida, no further participation was taken by respondent in said chancery cases; that nevertheless the Florida Circuit Court proceeded to enter a final chancery decree purporting to take away valuable rights of the respondent.

The United States Circuit Court of Appeals reversed the District Court.

Petitioner asserts a conflict between this decision and the decision of the Florida Supreme Court in *Rome Insurance Company et al. v. J. H. Corbett*, 66 Fla. 438, and upon such assertion applies to this United States Supreme Court for a writ of certiorari.

Respondent (1) denies that such conflicts exist and (2) contends that even if the asserted conflict were a fact, it would be of such nature that the Federal Court would exercise its own independent judgment.

We shall (1st) determine the nature of the State Court suits, (2nd) analyze the asserted conflict between the Federal and State Court, and (3rd) consider whether a cetriorari should be granted.

ARGUMENT

I.

THE STATE COURT SUITS WERE NOT IN REM

A. No Res Existed, Under Allegations of Bill.

Counsel for petitioner, First National Bank of Jasper, contents himself with claiming that the State Court suits were merely "*quasi in rem.*" (Mr. Hampton's brief p. 17. See also Mr. Fleming's brief p. 19). Counsel for petitioner, Bank of Jasper, admits that the alleged *res* was "a supposed indebtedness," (Mr. Fleming's brief p. 13).

This "supposed indebtedness" is the only simulation of a *res* that the ingenuity of petitioner's counsel has been able to evolve. Petitioner could go no further, for *if anything stands out conspicuously in the State Court cases it is the denial of this indebtedness.* This denial appears in the original bill, the amended bill, and in the decree of the State Court. Petitioner is estopped from asserting anything but that the "supposed" *res* was nonexistent.

Petitioner's counsel refer to many cases of attachment and of garnishment. In such cases, the indebtedness attached or garnished is real—does actually exist. If the indebtedness attached or garnished turns out to be merely a "supposed indebtedness," there is nothing to attach or garnish and the attachment or garnishment fails.

There must be a "real, not an imaginary" *res* to furnish the base for a proceeding *in rem*.

> *Chase v. Wetzlar*, 225 U. S. 79, 89, 56 L. Ed. 990, 995.

The counsel now representing petitioner were not counsel in the State Court cases, nor during the earlier stages of the present suit. When these counsel came into this case, respondent was vigorously and affirmatively asserting the validity of its certificates of deposit, and its right to collect thereon. As a consequence, the present counsel for petitoner have not been able to look at the State Court cases through the eyes of one who prepared them, fought through them and claimed from the start that respondent's certificates of deposit were void. *PETITIONER'S COUNSEL* claim the certificates of deposit are void by virtue of the State Court decree. *THEIR CLIENTS* claimed these certificates of deposit were void from the moment the first bill was filed in the State Court. This original claim removes and destroys even the possibility of there being a *res* in the State Court cases.

Petitioner cannot blow hot and cold. *Allegans contraria non est audiendus.* It cannot both affirm and deny. It cannot deny an indebtedness or *res* in the State Court, and, under the same facts, avow an indebtedness or *res* in the Federal Court. We have here an estoppel by record. Petitioner made his bed in the State Court and must lie on it. Changing counsel will not enable petitioner to transform a denial into an affirmative.

In *Davis v. Wakelee* 156 U. S. 680, 39 L. Ed. 578, this Court said:

"When a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."

To this point see also:

Brooklyn City & Newtown Railroad Company v. National Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61,
Daniels v. Tearney 102 U. S. 415, 26 L. Ed. 187,
Pease v. Rathbun-Jones Engineering Company, 243 U. S. 273, 61 L. Ed. 715,
Norfolk Southern Railway Company v. Chatman 244 U. S. 276, 61 L. Ed. 1131.

Counsel have failed to show any sort of seizure, attachment, sequestration or impounding of even the "supposed indebtedness" by the State Court. There was none. To stretch out the hand to seize a "supposed" *res* leaves the hand empty. But the State Court did not even reach out its "strong arm."

In *Loiza vs. Superior Court of San Francisco*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, the case principally relied upon by petitioner as a precedent for the State Court suits, and the case referred to in the opinion of the District Court (R. 44 of case No. 372), a receiver was appointed who actually took possession of certain property. No receiver was prayed for in the instant case, and for good reason. What funds could a receiver have identified and taken charge of as representing this "supposed indebtedness?" Certainly it is not to be thought that the petitioner bank had

segregated a specific lot of funds with which to meet payment of the obligation to respondent due "in current funds." And had petitioner done this, it could not thereby affect respondent's rights under its certificates of deposit.

The real and only purpose of the State Court suits as against this respondent was to cancel and decree to be void the certificates of deposit herein sued upon (see third ground of petition for certiorari). In the absence of any showing to the contrary, it will be presumed that these certificates of deposit were in the possession of respondent in its banking house in Georgia. Yet when this foreign corporation bank comes into the United States Court to collect upon these certificates, it is met by a State Court decree purporting to adjudicate that it holds merely a void scrap of paper.

In *Stockbridge v. Phoenix Mutual Life Insurance Co.*, 193 Fed. 558, 559-560 (Dist. Ct., D. Conn.), the court had before it a bill as novel as the bills filed in the Florida court, and regarding this bill the Federal Court pertinently said:

> "The petitioner has presented a very clever bill ————. The court ———— is bound to dissect and analyze, so that it may learn what is the real nature of the bill."
>
> "The absent defendant has, in law, a claim against the insurance company as the beneficiary under the two policies. The policies are merely statements on paper of what the contract was. The conditions precedent in the contract have been fulfilled, and payment on the contract is due. Is the claim a tangible, fixed, definite, and certain thing, with its situs here? It strikes me that Mrs. Ring-

> walt can assert and enforce her claim against the insurance company without coming into this district. It is a claim which, from its inherent nature, is transitory, attaches to her person, and can be taken with her wherever she goes. It is like the contents of a handbag, in which she might carry the usual accessories of a journey. She is no more constrained to come to Hartford to make use of her claim than she would be to use the contents of the handbag. It is a thing subject to constant shifting, changing, and uncertainty. That the policies may have been within the district when the suit was brought was immaterial. She could press her claim in another forum in spite of their presence here. The papers upon which the contracts of insurance are written are not the essence of the contention which this suit presents."

The State Court suits are an anomaly. They are a patent attempt by local citizens to rush into a local State Court and attempt to destroy past due negotiable instruments held by citizens of another State. The only case even slightly in point which counsel have been able to cite in support of their right to do this is *Loaiza v. Superior Court of San Francisco, supra,* but in that case, the notes, mortgages and gold coin in suit were within the jurisdiction of the California court and taken into custody by a receiver, under direction of a court order. Here the certificates of deposit were in Georgia and the indebtedness represented thereby asserted in the bills of complaint to be void. No court has ever held that such a suit was *in rem.*

B. Equity Acts In Personam.

The fact that respondent claims the right to collect its certificates of deposit out of "current funds" of petitioner did not authorize a decree against respondent upon mere constructive service, assuming for the moment that "current funds" could constitute a *res*. While only the certificates of deposit issued by the First National Bank of Jasper used the language "payable in current funds," yet this necessarily is all that the certificates issued by the Bank of Jasper could call for. No special fund was created, and certainly neither bank intended to or did set aside and keep idle a specific fund as represented by these certificates of deposit.

These State Court cases were in a court of equity.

Equity is a court of conscience. Its attention is directed primarily to the duty of the defendant, and it vindicates the right of the plaintiff through compelling the defendant to fulfill his co-relative duty, ordering him to do the very act he is under obligation to do, or to refrain from the very act he is under obligation not to do. Hence the maxim "Equity acts *in personam*."

While this power to act *in personam* upon the defendant in many ways enlarges the ability of the Chancellor to effect redress for the plaintiff, it also constitutes a specific limitation in other ways upon the jurisdiction of the Chancellor.

At no time throughout this litigation, has it been contended by the other side that any statute of Florida authorizes a chancellor to proceed *in rem* as against personal property. Furthermore in Florida, the courts have not developed by a

species of judicial legislation, any sort of spurious doctrine that will authorize a chancellor to act and adjudicate *in rem*, except where such authority is given him by statute.

Therefore, with neither a Florida statute nor a Florida decision authorizing a chancellor to act *in rem* in this case, it is not to be expected that this United States Supreme Court will undertake judicially to legislate regarding the powers of a court of equity in Florida.

The State Court suits are as closely analogous to a bill to remove a cloud on title as to any known form of procedure. It is settled that such a suit, in the absence of a statute, is *in personam*, and a non-resident defendant served merely constructively is not bound by a decree therein entered; *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101.

In *Boswell's Lessee v. Otis, et al.*, 9 How. 336, on page 350, 13 L. Ed. 164, 170, this Court said:

> "No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of the notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. *Jurisdiction cannot be assumed and exercised in such cases upon the general ground, that the subject matter of the suit is within the power of the court.*" (Italics ours).

The leading case of *Baldwin v. Hale*, 1 Wall. 223, 234, 17 L. Ed. 531, holds, as stated in the opinion, page 534:

> "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. *Legal notice cannot be given* and, consequently, there can be no obligation to appear, and of course there can be no legal defaults." (Italics ours).

An action for specific performance cannot, in the absence of a statute, be maintained by the courts of the State in which the property is located, against a non-resident served only constructively.

> *Hollingsworth v. Barbour*, 4 Peters 466; 7 L. Ed. 922;
> *Texas Company v. Central Fuel Oil Co.*, 194 Fed. 1 (CCA 8th Cir).
> *Snell v. Hill*, 263 Ill. 211, 105 N. E. 16;
> *Homer v. Ellis*, 75 Kan. 675; 90 Pac. 275; 121 Am. St. Rep. 446;
> *Spurr v. Scoville*, 3 Cush. 578;
> *Silver Camp Mining Co. v. Dickert*, 31 Montana 488; 78 Pac. 967; 67 L. R. A. 940; 3 Ann. Cas. 1000.

We would also refer to the valuable discussion of the nature of equity decrees found in *Langdell's Equity Pleading*, 2nd. Ed. Sections 42 and 43, also note appended to Section 42, and found on pages 35 to 38, also Section 184. See also the clear discussion in *10 R. C. L.* 364 and 387.

An injunction operates only *in personam: Hitch-*

man Coal & Coke Co. v. Mitchell, 245 U. S. 229; 62 L. Ed. 260.

The nature of an interpleader suit is particularly noteworthy in determining the validity of the decrees of the Florida State Court. In an interpleader suit, the complainant places an actual specific fund in the very lap of the Court, and prays its adjudication as between the interpleaded defendants. Here might seem to be a *res*. But it is uniformly recognized that a non-resident defendant served only by publication is not bound by a decree which undertakes to cut off his rights:

New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 521; 60 L. Ed. 1140, 1142;
Bell v. Gunn, 94 Ga. 642; 21 S. E. 899;
Gary v. Northeastern Masonic Aid Assn. (Iowa), 50 N.W. 27;
Tremblay v. Aetna Life Ins. Co., 97 Me. 547; 55 Atl. 509; 94 Amer. St. Rep. 521;
Expressmen's Mutual Benefit Assn. v. Hurlock, 91 Md. 585; 46 Atl. 957; 80 Amer. St. Rep. 470;
Scharmann v. Union Pac. Ry. (Minn.) 175 N. W. 554;
Ward v. Bankers Life Co. 99 Neb. 812; 157 N. W. 1017;
Cross v. Armstrong, 44 Ohio State 613; 10 N. E. 160;
Washington Life Ins. Co. v. Gooding, 19 Tex. Civ. App. 490; 49 S. W. 123.

Cross v. Armstrong, supra, is an especially strong and well-reasoned case, and has been twice approved by this Court. In *Leigh v. Green*, 193 U. S. 79, 48 L. Ed. 623, 628, this Court said:

"When the proceedings are *in personam* the

> object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment. *Cross v. Armstrong*, 44 Ohio St. 613, 624, 10 N. E. 160."

Again, a still more important acceptation by this Court of the principles announced by the Ohio Court is found in *New York Life Insurance Co. v. Dunlevy*, 241 U. S. 518, 60 L. Ed. 1140, 1142, as follows:

> "The interpleader initiated by the company was an altogether different matter. *This was an attempt to bring about a final and conclusive adjudication of her personal rights*, (Italics ours), not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Shinn, Attachment & Garnishment*, Sec. 674. See *Cross v. Armstrong*, 44 Ohio St. 613, 623, 625, 10 N. E. 160."

A situation quite similar to the present case was passed upon in *Aetna Life Insurance Co. v. Lyon County*, 95 Fed. 325, at page 331, where it is said:

> "Much reliance is placed by the defendant upon a decree rendered in a case entitled *Anderson v. Insurance Co.* (Iowa) 55 N. W. 348, by the district court of O'Brien County, Iowa,

and affirmed on appeal by the state supreme court, which was a proceeding in equity brought by certain residents and taxpayers of O'Brien county to restrain the county treasurer from making any payments on the bonds negotiated by R. L. Richards, and to have the bonds adjudged to be illegal and non-enforceable, and in which case a decree to that effect was entered. It is shown upon the record that in that case service of the original notice therein was not had upon any one of the complainants within the state of Iowa, they being all residents of other states, and no appearance therein was entered for any of the complainants except the Orient Fire Insurance Company, and therefore the decree therein is of no force against any of the complainants, except the Orient Company; it being well settled that, in personal actions, the service of notice by publication, or by reading the process to the party, at a place outside of the territorial jurisdiction of the court, confers no jurisdiction over the party thus served. *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586. The adjudication in that case had no effect upon the rights of any of the complainants herein, except the Orient Company."

In *Brooklyn v. Aetna Life Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416, Justice Harlan speaking for the Court said:

"The suit commenced and determined in the Circuit Court of Lee County was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the Town, and delivered to the Railroad Company. Upon principle and authority, no decree therein rendered

could bind anyone not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. *Pennoyer v. Neff*, 95 U. S. 714, and authorities there cited."

To the same effect see:

Township of Empire v. Darlington, 101 U. S. 87, 25 L. Ed. 878.
Pana v. Bowler, 107 U. S. 529, 27 L. Ed. 424.

In two decisions, this Court has pointedly stated that "the foundation of jurisdiction is physical power:"

McDonald v. Mabee, 243 U. S. 90, 91, 61 L. Ed. 608, 609.
In the matter of Indiana Transportation Co., 244 U. S. 456, 457, 61 L. Ed. 1253, 1255.

Hence it follows that where the jurisdiction is *in personam*, such jurisdiction cannot exist unless founded on power over the person.

We submit that the Hamilton County Circuit Court was wholly lacking in power to enter a decree adjudicating respondent's rights under the certificates of deposit herein sued upon.

II.

NO CONFLICT BETWEEN FEDERAL AND STATE COURTS

A. Question Stated.

The question of procedure upon which petitioner asserts a conflict between the Federal and State Courts was admirably stated and determined in the opinion of the Circuit Court of Appeals as follows:

> "It is contended by defendant in error that the effect of appealing from an interlocutory order by the plaintiff in error (defendant in the Corbett case) was a general appearance on its part in that case, and conferred jurisdiction over its person on the circuit court on the remand of the case. The rule in Florida, differing from that which obtains in the federal courts, is to the effect that an appellant, though objecting to the sufficiency of service successfully, is considered in court upon the return of the case to the lower court. Conceding that this court will follow the rule of decision in the state court, in passing upon a judgment in that court, we think the Florida rule did not apply in the Corbett case. The question of its applicability was suggested, but not decided by the Supreme Court of Florida in its opinion in that case, because the appellee asked that the appeal be decided on another ground. The Supreme Court held that—
>
> 'If the statute be followed, there is no right in the non-resident to quash this notice (by publication); he has his right, if not waived, to object should the court

thereafter commit an error against him.'

"The order of the circuit court was for that reason affirmed, apparently leaving the sufficiency and effect of the substituted service to be determined by the character of relief awarded against the non-residents upon final decree. The appeal was from an interlocutory order of the circuit court, which affected only the question of service. *It was not an appeal from a final decree, upon which the insufficiency of service was assigned, with other error, as in the cases cited supporting the Florida rule.* (Italics ours). The Florida statute allowing appeals from interlocutory orders was held by its Supreme Court in the Corbett Case to cover an order affecting service only. No other question than the rightful presence of the non-residents in the circuit court by virtue of the substituted service was presented by the appeal.

"If the rule contended for applies to such an interlocutory appeal, then the Florida Legislature and its Supreme Court did a futile thing in providing a method of appealing from an order of the circuit court sustaining service, where the taking of the appeal itself by the party complaining of service alone puts the party in court as effectually as if properly served, and renders the appeal ineffectual for any purpose. *We are not prepared* TO EXTEND THE RULE IN FLORIDA *as to the effect as an appearance of the taking of an appeal from a final decree, upon which error based on the insufficiency of service was relied upon with others, to an appeal from an* INTERLOCUTORY ORDER, WHICH INVOLVED ONLY THE QUESTION AS TO WHETHER THE APPELLANT WAS RIGHTFULLY IN COURT, *as in the Corbett case.* (Italics ours).

"Conceding that there is no authority in

> the practice of Florida for special appeals, an appeal from an interlocutory order, questioning the sufficiency of service only, is authorized, and from this it is to be implied that an appellant is to derive some benefit from the appeal, which he could not do if the taking of the appeal constituted a general appearance on his part. It is not reasonably supposable that it was intended that the taking, as allowed by the statute, of an appeal from such an order as the one in question, should have the effect of depriving the appellant of the sole benefit sought to be obtained, or obtainable, by a resort to the remedy given. *In the absence of authority from the Florida Supreme Court, applying the general rule to the case of* SUCH AN INTERLOCUTORY APPEAL, *common sense requires us to decline to make the application.* (Italics ours). This contention is made by defendant in error, though there was a stipulation in the state court case, that the supersedeas should not constitute a general appearance."

It would be difficult indeed to state in clearer or plainer language than is done by the sentences italicized in the foregoing quotation, the reasons why there is no conflict between the Federal and State Courts.

B. UNDERLYING PRINCIPLES.

There can be no question of respondent's right to have entered the special appearance in the State Court and that such special appearance did not constitute a general appearance:

Standley v. Arnow, 13 Fla. 361;
Tidwell v. Witherspoon, 18 Fla. 282;

Seacoast Lumber Co. v. R. J. and B. F. Camp Lumber Co., 63 Fla. 604;
Harkness v. Hyde 98 U. S. 476, 25 L. Ed. 237;
Davis v. Cleaveland, C. C. & St. L. R. Co., 217 U. S. 157, 54 L. Ed. 708.

Let us next examine what character of participation appears by respondent in these chancery cases after respondent's motions to quash service had been denied. Going a trifle outside the record in this particular case, and inspecting the records in the four companion cases now before this Court, it will be found that there were sixteen of these Chancery cases and that in fourteen of the cases stipulations were entered into, all of which substantially provided:

> "That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the court overruling the motions of the said defendants to quash service in the case of J. H. Corbett vs. Rome Insurance Company, et al., which said case is now on trial and being prosecuted in this Court;
>
> "That the ultimate decision of the said appeal in said case of J. H. Corbett vs. Rome Insurance Company shall be decisive of the validity of the service by publication on said defendants in this case, and if the service in the said Corbett case be ultimately held defective, and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Corbett case, shall be held defective and shall be quashed; and
>
> "That *this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;*"

Respondent was one of the defendants referred to in this stipulation.

For some reason petitioner now completely ignores the portion of this stipulation above italicized. This portion of the stipulation is especially noteworthy in view of the second stipulation entered into by petitioner's then counsel, together with a pointed statement in the opinion of the Supreme Court of Florida.

In the remaining two of these sixteen Chancery suits, "special appeals" were taken to the Supreme Court of Florida from the interlocutory orders of the Chancellor denying the motions to quash service. These cases are known as *Rome Insurance Co. et al vs. Corbett*, 66 Fla. 438, and *Rome Insurance Co. et al. vs. Carter*, 66 Fla. 441.

In these appealed cases, were filed the stipulation with reference to respondent's application for supersedeas not constituting a general appearance. (Page 4 of this brief).

This second stipulation, petitioner in its extremity, now also completely ignores. Here again is forcibly exhibited the fact that petitioner's present counsel are strangers to the State Court cases. These counsel did not live with those cases, and, whatever the cause may be, do not display an understanding of them. The counsel who represented petitioner in the State Courts did not attempt to violate any of these stipulations before the Florida Supreme Court. Note the following from that Court:

> "It may well be that this appeal so operates as a general appearance in the circuit court, as to render the question before us a moot one, *but the appellee does not ask us so to*

hold;" (Italics ours) *Rome Ins. Co. v. Corbett*, 66 Fla. 438, 439.

Section 1908, *General Statutes of Florida*, allows an appeal from interlocutory decrees in chancery. This statute reads:

> "From interlocutory decrees. Appeals may be taken and prosecuted from any interlocutory order, decision, judgment or decree of the circuit courts of this state, when sitting as courts of equity; but the conferring of the right shall not be construed so as to deprive either party from deferring and postponing the entry of his appeal until after the entry of the final decree, or end of the cause as prescribed by law; nor shall such postponement of the appeal be decreed, held or taken to be an acquiescence in the propriety of any interlocutory order or decree made in the progress of the cause, or any waiver of any error therein."

Section 1906, *General Statutes of Florida*, provides:

> "Appeals in chancery shall be matters of right."

A ruling that the defendant is properly in court is such an order as may be appealed from. *Agnew v. Adams*, 24 S. C. 86.

Therefore when respondent exercised its "right" to appeal from the interlocutory orders of the Circuit Court over-ruling its motion to quash service, and when every pleading or paper which respondent filed in prosecuting said special appeal was emphatically limited to a special ap-

pearance, we submit that it entered a true special appeal analogous to a special appearance in a lower court, and that such an appeal does not constitute a general appearance. To hold that such an appeal did constitute a general appearance would be to deprive respondent of the "*right*" to appeal expressly given it by Statute.

In the declaration of rights of the *Constitution of Florida*, Section 4 provides:

> "SECTION 4: All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

To hold the prosecution of the special appeal to constitute a general appearance would be to place a penalty on the exercise of the *right* to appeal. Such a holding would be a denial of justice.

A judgment of a court upon its own powers ought never to be final, or else a court would be empowered, however limited its jurisdiction, to take upon itself unbounded jurisdiction.

Respondent is entitled to have the law laid down correctly. If the Hamilton County court proceeded erroneously under the service attempted to be had upon respondent in the chancery cases, respondent has the right to be protected from such erroneous orders. The *right* is given by statute, though this statute would, from the standpoint of justice, appear to be merely declaratory of the common law, using common law in its broad sense. For *is not the object of law the protection rather than the over-throw of legal rights?*

The crucial test is this: How could a court of justice come to the conclusion that the orders of the Florida Circuit Court specially appealed from were erroneous, and then declare that the presenting of these erroneous orders to the Supreme Court of Florida for the purpose of having them corrected, completely nullified the effect of the correction? How could a judicial tribunal announce the law to be that these special appellants had been subjected to erroneous orders of the Florida Circuit Court, and in the same breath say that their ascertaining this fact deprived them of any benefit therefrom? If insufficient service had been made upon the special appellants, why should they be punished for attempting to demonstrate that fact? *Why should the special appellants be penalized for insisting on their rights?* We insist that the only answer to these questions which will be in harmony with the declaration in Section IV of the Bill of Rights of the Florida Constitution, that justice shall not be denied, is to hold these chancery appeals to be true special appeals, and that their prosecution did not constitute a general appearance. *To enforce a right should not be to lose it.* This would be contrary to natural justice.

True it is that special appellants filed several papers in the Supreme Court of Florida, as well as in the Circuit Court of Hamilton County. But they did nothing which was unnecessary in order to protect their rights and to enable them to go before the Florida Supreme Court to present the orders of the Circuit Court specially appealed from. Special appellants were not responsible for the fact that so many papers must be filed in order to prosecute an appeal. Because special appellants

have complied with the requirements of the law for prosecuting an appeal could be no ground for declaring that they have entered a general appearance.

The fact that special appellants had notice of these chancery suits cannot of itself affect in any way the question of what constitutes a general appearance. A defendant in making a motion to quash service in the Circuit Court has just as much notice of the suit as had special appellants of these suits in which they prosecuted special appeals. The mere fact that special appellants had notice of the suit and moved to quash service did not bring them into court, provided the pleadings have been limited to a special appearance.

The question is not, did respondent have notice of the chancery suits, but is, had it been legally served with process? If every sheriff in the state of Florida had gone to Georgia and delivered a copy of a subpoena to appear in this suit personally to each officer and director of respondent bank and read the subpoena to each of these officers, this would not constitute legal service. It would, however, be notice.

Furthermore, we can no more construe the purpose and effect of a pleading or other paper filed in a suit by looking only to a portion of it, than we can interpret any other written instrument by picking out only selected portions. Pleadings, like contracts, deeds, wills, statutes, court orders, and judicial opinions, are to be construed by looking at the four corners of the document. It may be, perchance, and not infrequently is, determined that a pleading when so examined is held to be a nullity. But no court can add to or detract from

a pleading any more than it can add to or detract from the terms of any other written instrument.

When we look at every pleading, paper, or even bond filed by special appellants in the Supreme Court of Florida, it becomes apparent that these pleadings and other papers were and could only be one of two things:

(1st) They were either so limited that they could not do other than amount to a special appeal —their definite limitations would absolutely stand in the way of their amounting to a general appearance, or

(2nd) The limitations conspicuously written into these papers were so drastic that the papers were a nullity.

When the Florida Supreme Court accepted the transcripts of record, and rendered its decision based thereon, it decided that the pleadings, etc., were not nullities; but neither the Florida Supreme Court nor any other Court could re-write these pleadings or make them other than what the parties had made them. Therefore the Florida Supreme Court must be held to have accepted these transcripts as filed in and amounting to a special appeal. The Florida Supreme Court certainly did not hold otherwise, for they expressly stated that:

> "These non-residents have sued out *what they term a special appeal.* (Italics ours).
>
> "It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending." *Rome Insurance Co. vs. Corbett*, 66 Fla. 438, 439.

Moreover, the then counsel on the other side were convinced of the soundness of our position.

Special appeals of this character are not new, and so far as we have been able to find authorities upon this point, they are uniform in holding that such an appeal does not constitute a general appearance.

Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 Pac. 498;
Freer v. White, 91 Mich. 74, 51 N. W. 807;
Craighead v. Martin, 25 Minn. 41;
Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019;
Lyons v. Miller, 2 N. D. 1, 48 N. W. 514;
Paxton v. Daniel, 1 Wash. St. 19, 23 Pac. 441;
Dikeman v. Mrotek, 76 Wis. 332, 45 N. W. 118.

"*Non potest adduci Exceptio ejusdem Rei cujus petitur Dissolutio.*" (A matter, the validity of which is at issue in legal proceedings cannot be set up as a bar thereto). *Broom's Legal Maxims*, 8 ed. 133.

C. First Distinction Between State and Federal Rulings—No Voluntary Appeal.

Petitioner refers to the holding of the Florida cases to the effect that:

> "As the appellant has made herself a party to the suit by *voluntarily* (italics ours) appearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the

> court in like manner as if she had been duly served with process," *Standley v. Arnow*, 13 Fla. 361.

We call attention to just what was announced in *Standley vs. Arnow, supra.* The Court states that since appellant made herself a party to the suit by voluntarily appearing, etc., she must be considered as regularly before the court. *The word* VOLUNTARILY *marks one of the distinguishing features between all holdings of the Florida Court, and the present case.* Special appellants showed as far as it was possible to be shown, that they had not voluntarily appeared, either in the lower or the appellate court. They no more voluntarily appeared to prosecute their special appeal than they did when they entered their special appearance in the lower court and moved to quash service. The one cannot constitute a voluntary or general appearance more than the other.

To show how the subsequent Florida cases dealing with the question of an appeal constituting a general appearance are founded on *Standley vs. Arnow*, we quote from these later cases:

In *Tunno & Jessup & Co. v. Robert*, 16 Fla. 738, on page 751 the Court says:

> "The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before this Court in like manner as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167."

In this case the reference to 13 Fla. 368 is to the quotation taken above from *Standley vs. Arnow.*

In *Shrader v. Shrader*, 36 Fla. 502, on page 518 the Court says:

> "Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. *Standley v. Arnow*, 13 Fla. 361."

In *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818, 820, the Court says:

> "The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. *Standley vs. Arnow*, and *Finlayson v. Lipscomb, supra.*"

The reference to *Finlayson v. Lipscomb* in the last quotation is meant to be to the case of *Tunno & Jessup & Co. v. Robert.* This is shown by looking up the citation given for *Finlayson v. Lipscomb* earlier in the opinion in *Wylly v. Sanford Loan & Trust Co.*

In *Rumeli v. City of Tampa*, 48 Fla. 112, on page 114 the Court says:

> "The appeal of the defendant Rumeli operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818."

This case as seen follows point-blank *Wylly v. Sanford Loan & Trust Co.*, which in turn follows *Standley v. Arnow* and *Tunno & Jessup & Co. v. Robert. Tunno & Jessup & Co. v. Robert* has been seen to refer directly back to *Standley v. Arnow.*

Thus we see that *Standley v. Arnow, supra,* is the case which each subsequent Florida case either cites directly as the authority for its holding, or is the case to which each of these subsequent cases leads back as its basis.

Petitioner contends that the special appearance was a "voluntary" proceeding, though presenting not a single authority in support thereof.

The authorities seem to be unanimous that *such a proceeding is not voluntary.*

In *Craighead v. Martin,* 25 Minn., 41, it is said:

> "It would seem too plain for argument that such an act, which in itself is a denial of all authority in the justice, cannot be regarded as a voluntary appearance, and express recognition of his authority."

In *Freer v. White,* 91 Mich. 74, 51 N. W. 807, the Michigan Court pertinently said:

> "It would be presuming against the fact to assume that there was any intention on the part of the defendant to submit himself to the jurisdiction of the court."

In *Pugh v. Loisel,* 219 Fed. 417, 424, (5th. C. C. A.) is the following:

> "He is not to be held to have voluntarily submitted himself to the jurisdiction of that court by protesting against its exercise of jurisdiction. *Big Vein Coal Co. v. Read,* 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053."

This last court again in *Smith v. Government of Canal Zone,* 249 Fed. 273, 278, said:

"This appellant's admission of the court's jurisdiction, or consent to the exercise of it, is not to be inferred or implied from a previous explicit denial of its jurisdiction, though such denial was based upon grounds other than the one stated in the motion to set aside the service of process. *A denial of jurisdiction is not to be given effect as an admission of it.* (Italics ours). *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; *Pugh v. Loisel*, 219 Fed. 417, 135, C. C. A. 221."

In *Harkness v. Hyde*, 98 U. S. 476, 478, 25 L. Ed. 237, this court said:

"Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity."

This Court further said *In the matter of Indiana Transportation Co.*, 244 U. S. 456, 458, 61 L. Ed. 1253, 155:

"Persons by becoming suitors do not place themselves for all purposes under the control of the Court."

D. Second Distinction Between State and Federal Rulings—No Adjudication or Contest on Merits.

Special appellants in no way contested the chancery suits on the merits. They appeared specially and for one purpose only. This purpose was to settle the question of service. No other

question had been raised by any of the defendants. There had been no adjudication whatever on the merits.

Jurisdiction is founded upon service, or, as the Federal Supreme Court says, upon "physical power," which is obtained only by due serivce of process. The first question to be settled in any case is that of jurisdiction. Courts will settle questions of jurisdiction, whenever possible, preliminarily to entering upon the cause. This is precisely and solely what the present respondent requested of the court in the chancery cases. After the chancery court assumed to go into the merits of those cases, the present respondent refrained from the slightest participation.

In each of the cases cited by petitioner in which the Florida Supreme Court held an appeal to constitute a general appearance, the appeal was upon an adjudication of the merits of the case, and not merely upon a ruling on the question of service—with the single exception of the case of *Rome Insurance Co. v. Corbett* which is the decision we are here analyzing and which we are emphatic in asserting does not hold what petitioner contends (pages 34 and 35 of this brief).

In Mr. Fleming's brief, page 9, it is stated:

> "In the case of *Rumeli v. Tampa*, 48 Fla. 112, 37 So. 563, it appeared that the appeal was from an interlocutory appeal, the only decree mentioned in the opinion of the Court or the statement of facts being a decree *pro confesso*."

In reply we quote from a letter written by the Clerk of the Florida Supreme Court:

"The record in the case of *Rumeli v. City of Tampa*, 48 Fla. 112, shows that Judge Wall entered a final decree in said cause November 7, 1903, a decree *pro confesso* having been entered therein November 2, 1903. The final decree purported to run against Rumeli as well as against the other defendants named in the bill."

It thus appears that, without a single exception, in every case in which the Florida Court held an appeal to constitute a general appearance, the appeal was taken after entry of final decree.

A second distinction between this Corbett case and all other Florida cases is the lack, in the Corbett appeal, of any adjudication or contest whatsoever on the merits.

Furthermore five of the cases cited by counsel are decisions on writs of error at common law, and are not in point.

These cases are:

Drew Lumber Co. v. Walter, 45 Fla. 252;
Hayman v. Neil, 53 Fla. 127;
Barnick v. Rouse, 53 Fla. 643;
Busard v. Hutson, 65 Fla. 479;
Henry v. Spitler, 67 Fla. 146.

Unlike Florida chancery practice allowing appeals from interlocutory orders (page 22 of this brief), common law writs of error are allowed in Florida only after final judgment.

Section 1691 of the General Statutes of Florida reads:

"*Writs of error—only from final judgments:* Writs of error shall lie only from

final judgments except as specified in Section 1695."

Section 1695 of the Florida General Statutes, referred to in the section just quoted, allows writ of error to the party aggrieved by the granting of a motion for new trial, without waiting for final judgment. Even so a writ of error follows a contest on the merits.

That an appeal solely upon questions of service or jurisdiction over a defendant is not a general appearance, see cases collated on page 27 of this brief.

E. Real Holding of Florida Court.

The Florida Supreme Court did not hold the so called constructive service to be a valid service, nor the special appeal to be a general appearance. What it did hold was that this so called service was a mere notice, which may be paid attention to or not, as the defendant may choose. Said the Florida Court:

> "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this *notice;* he has his right if not waived, to object should the court thereafter commit an error against him," (italics ours) *Rome Ins. Co., et al. vs. Corbett,* 66 Fla. 438, 440.

Therefore, the most that can be said is that the respondent received a notice that sixteen chan-

cery suits had been brought against him, which notice was lawfully given. This notice did not give the chancellor "physical power" *in personam* over respondent.

The giving of this notice is not "confined in its operation to the cases where the court might make final decree or judgment . . . . It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident . . . . . We are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree." Quoted from *Rome Ins. Co. vs. Corbett*, 66 Fla. 438.

But the Circuit Court of Hamilton County did proceed to enter an unauthorized decree—a decree beyond its power to enter—a decree falling within that class of cases in which a mere notice of suit to a non-resident does not permit of the making of a final decree or judgment. Such a decree is just as much a nullity, as was the judgment held void in *Pennoyer v. Neff*, 96 U. S. 714, 24 L. Ed. 565.

III.

THIS CASE DOES NOT WARRANT GRANTING A WRIT OF CERTIORARI

A. No Conflict Between Federal and State Courts.

It is submitted that we have just shown the non-existence of the asserted conflict "between the Supreme Court of the State of Florida and the

United States Circuit Court of Appeals in and for the Fifth Circuit" (first ground of petition), which is the principal and really the sole ground upon which petitioner relies in seeking a writ of certiorari.

B. FEDERAL COURT ENTITLED TO EXERCISE ITS OWN INDEPENDENT JUDGMENT.

Had there existed such conflict as petitioner contends, the Federal Court should exercise its own independent judgment upon the validity and effect of service of process attempted by the Florida State Court upon this respondent foreign corporation bank. The courts of the United States will not leave a foreign corporation to the mercy of the decisions of state courts respecting the validity and effect of a purported service, either actual or constructive:

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517;
Barrow Steamship Co. v. Kane, 170 U. S. 100, 111, 42 L. Ed. 964, 968;
Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 113;
Mechanical Appliance Co. v. Castleman, 215 U. S. 437; 54 L. Ed. 272;
Riverside & D. R. Cotton Mills v. Menefee, 237 U. S. 189, 59 L. Ed. 910;
Meisukas v. Greenough Red Ash Coal Co., 244 U. S. 54, 61 L. Ed. 987.

We would also refer to the recent pertinent statement of Mr. Justice McKenna in *Chipman v. Thomas B. Jeffrey Company*, decided January 19, 1920:

"In resting the case on New York decisions we do not wish to be understood that the validity of such service as here involved would not be of Federal cognizance, whatever the decision of a state court, and refer to *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *St. Louis Southwestern R. Co. v. Alexander, supra; Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710, 37 Sup. Ct. Rep. 280; *Meisukas v. Greenough Red Ash Coal Co.* 244 U. S. 54, 61 L. Ed. 987, 37 Sup. Ct. Rep. 593; *People's Tobacco Co. v. American Tobacco Co.* 246 U. S. 79, 62 L. Ed. 587, 38 Sup. Ct. Rep. 223, Ann. Cas. 1918 C, 537."

Furthermore, the rights of holders of commercial paper are here involved, and in such cases the courts of the United States exercise their own independent judgment:

Pana v. Bowler, 107 U. S. 529; 27 L. Ed. 424;

Presidio County v. Noel-Young Bond & Stock Co., 212 U. S. 58, 73; 53 L. Ed. 402, 408;

Rollings v. Lake County, 34 Fed. 845, per Brewer, J;

Bank of Edgefield v. Farmers Cooperative Mfg. Co., 52 Fed. 98, (5th. C. C. A.)

Town of Newberne v. National Bank of Barnesville, Ohio, 234 Fed. 209, (6th. C. C. A.)

The property right of the holder of a negotiable instrument is different from the right of the owner of real property or other personal chattels, as pointed out in *Town of Enfield v. Jordan*, 119 U. S. 680, 693, 30 L. Ed. 523, 529:

> "Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities or by the sale of articles in market overt in the usual course of trade."

Said Mr. Justice Story in *Swift v. Tyson*, 16 Peters 1, 19, 10 L. Ed. 865, 871:

> "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*"

The state court cases are a patent attempt to keep from this respondent foreign corporation bank its right to submit to a court of the United States the merits of its claim on the certificates of deposit. Well may we recall what this Court said in *Gordon v. Longest*, 41 U. S. 97, 104, 10 L. Ed. 900, 903:

> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each state, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress.'

C. THIS PURELY PRIVATE CONTROVERSY WOULD NOT JUSTIFY A WRIT OF CERTIORARI BEFORE FINAL JUDGMENT.

Said this Court in *Forsyth v. Hammond*, 166 U. S. 506, 514, 41 L. Ed. 1095, 1098:

> "We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the court of appeals. *Chicago & N. W. R. Co. v. Osborne*, 146 U. S. 354."

Neither the interest of the nation nor of any state is here involved. The decision of the United States Circuit Court of Appeals is by a unanimous court. Petitioner did not apply for a rehearing in the Court of Appeals. The asserted conflict between the state and federal courts is indicated by petitioner only in the vaguest and most shadowy manner, and, as herein shown, is without merit.

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted, /Henry C. Clark.

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